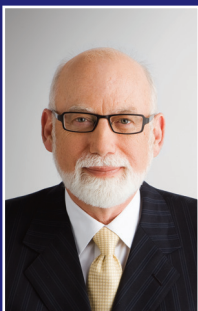


They're Coming After You: Civil Liability of Directors

Directors & Officers Six Part Series (Part 6)
March 24, 2010



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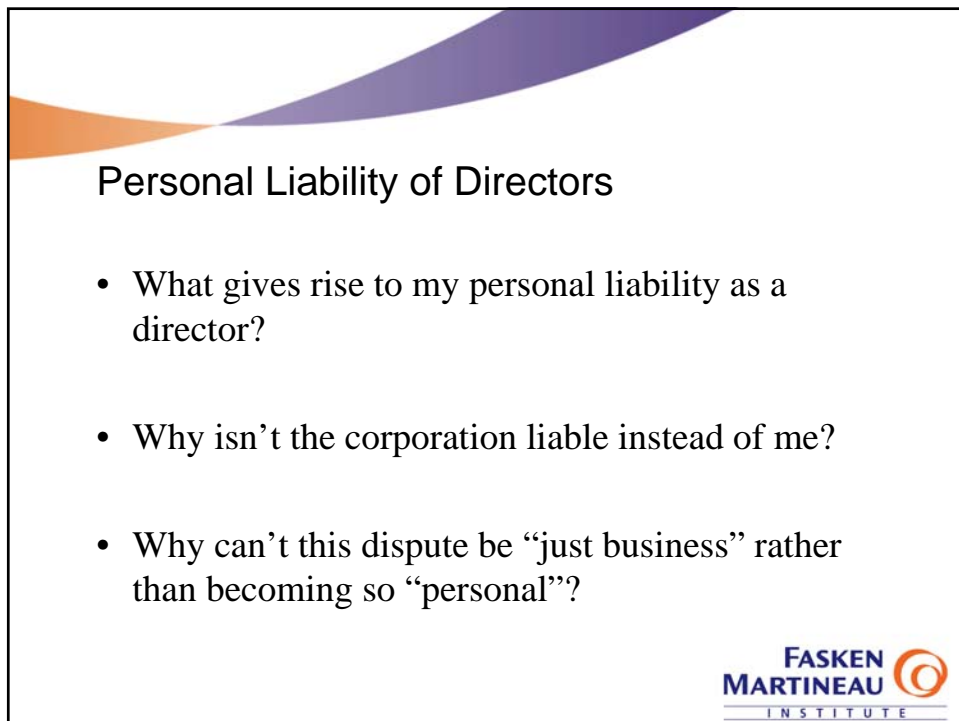
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They're Coming After You:
Civil Liability of Directors
Directors & Officers Part 6
March 24, 2010


Presentation by:
Robert S. Harrison
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Personal Liability of Directors

- What gives rise to my personal liability as a director?
- Why isn't the corporation liable instead of me?
- Why can't this dispute be "just business" rather than becoming so "personal"?

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Common Law Liability

- Tort liability to third parties
 - inducing breach of contract
 - *Said v. Butt*, [1920] 3 K.B. 497
 - *AGDA v. Valcom* (1999), 43 O.R. (3d) 101 (Ont. C.A.)
 - negligent misrepresentation
 - *NBD v. Dofasco*, (1999), 46 O.R. (3d) 514 (Ont. CA.); leave to appeal refused [2000] SSCA No. 96
 - fraud and conspiracy
 - defamation



Common Law Liability to the Corporation

- Tort liability to the corporation
 - fraud
 - misuse of confidential information
- Contractual liability to the corporation
 - non-competition and non-solicitation covenants
 - confidentiality covenants





Fiduciary Duty

- diversion of corporate opportunity
- improperly profiting from a fiduciary position
- conflict of interest
- no use or disclosure of confidential information
- improper competition
- many fiduciary duties survive the termination of the relationship



Statutory liability

“Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

OBCA, section 134(1) and CBCA section 122(1)

Statutory liability

- derivative actions
 - *Foss v. Harbottle* (1843), 67 E.R. 189
 - *Ford Motor Co. of Canada v. OMERS* (2006), 79 O.R. (3d) 81 (Ont. C.A.); leave to appeal refused 2006 CanLII 29064
- oppression
 - who can be a complainant?
 - reasonable expectations as a shareholder
 - unfairly prejudicial or unfairly disregards
 - business judgment
 - *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69

Civil liability under securities legislation

- misrepresentation in prospectus, offering memorandum, take over bid circular
- liability for secondary market disclosure
- the burden of proof
- leave, defences and limits on liability
- *McKenna v. Gammon Gold Inc.* – March 16, 2010 ONSC 1591
- *Silver v. IMAX Corporation*, Gelfond, Wechsler and Joyce – 2009 can LII 72334 (ON S.C)
- *Silver v. IMAX Corporation*, Gelfond, Wechsler and Joyce – 2009 can LII 72342 (ON S.C)

The Business Judgment Rule

“Directors and officers will not be held in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in the light of all the circumstances about which the directors knew or ought to have known.”

Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 SCR 461 at 493 (S.C.C.)

* Implicitly: no evidence of fraud, bad faith or self-dealing




The appropriate role of advisors

“A Board is entitled, indeed encouraged, to retain advisors, but this does not relieve directors of the obligation to exercise reasonable diligence.... The proper exercise of due care by a director in informing himself of material information and in overseeing the outside advice on which he might appropriately rely is, of necessity, a pre-condition to performing his ultimate duty of acting in good faith to protect the best interests of the corporation...”

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.); (2004), 250 DLR (4th) 526 (Ont. C.A.).





Can delegation now mean not having to take responsibility later?

“... the directors shall manage or supervise the management of the business and affairs of a corporation”

OBCA s. 115(1)



In re Lehman Brothers Holdings Inc.

“Lehman’s financial plight, and the consequences to Lehman’s creditors and shareholders, was exacerbated by Lehman executives, whose conduct ranged from serious but non-culpable errors of business judgment to actionable balance sheet manipulation....”

The business decisions that brought Lehman to its crisis of confidence may have been in error but were largely within the business judgment rule. But the decision not to disclose the effects of those judgments does give rise to colorable claims against the senior officers who oversaw and certified misleading financial statements....”

In re Lehman Brothers Holdings Inc., court-appointed examiner Anton Valukas report of March 11, 2010





Minimizing Risk: what can I do to protect myself?

- the process is as important as the outcome
- meetings and minutes
- do you *really* understand what's being discussed?
- did you check the map and ask for directions before driving off the cliff?
- delegation now does *not* result in avoiding responsibility, and liability, later
- do due diligence
- examine alternatives rejected by management (and the reasons they were rejected)



Questions?



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REFERENCE MATERIAL

**SOURCES OF LIABILITY FOR DIRECTORS AND OFFICERS OF
 ONTARIO CORPORATIONS**

OBLIGATION	EXPLANATION	SOURCE
Act Honestly	Directors and officers must be open, candid and honest in dealing with the corporation and its business.	<i>Ontario Business Corporations Act</i> (“OBCA”), s. 134(1)
Be Loyal	Directors and officers must not put themselves in a position where their personal interests are served ahead of the corporation’s interests.	OBCA, s. 134(1)
Duty of Care	Directors and officers are expected to have, and exercise, the same degree of skill that can be reasonably expected from a person with the director’s knowledge and experience in acting in comparable circumstances.	OBCA, s. 134(1)
Duty of Skill	The “business judgment rule” requires that directors and officers have a degree of skill commensurate with their level of knowledge and experience. In this respect, if a director or officer has a particular area of expertise, that area of expertise will also define their duty of skill.	OBCA, s. 134(1)
Act Prudently	The duty of prudence requires directors and officers to use common sense and to act carefully, deliberately and cautiously.	OBCA, s. 134(1)
Act Diligently	Directors and officers must maintain knowledge of the manner in which the business is conducted, the sources of its revenue and the use of its resources.	OBCA, s. 134(1)

<p>Treat Stakeholders Fairly</p>	<p>Under the OBCA, if a corporation engages in conduct that is deemed oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of any security holder, creditor, director or officer of the corporation, the court may make a variety of orders, some of which may involve orders against directors personally. For example, a court can order a director be replaced, or can find a director personally liable.</p>	<p>OBCA, s. 248</p>
<p>Unpaid Employees Wages and Vacation Pay</p>	<p>Under certain conditions, the directors of a corporation can be liable to the employees of the corporation for all debts not exceeding six months' wages, that become payable while they are directors, for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the <i>Employment Standards Act</i>, and the regulations thereunder, or under any collective agreement made by the corporation.</p>	<p>OBCA, s. 131(1) <i>Employment Standards Act</i>, s. 81</p>
	<p>The <i>Wage Earners Protection Program Act</i> recently came into effect. It sets up a program through which employees can recover, from the federal government, wages, vacation, severance and termination pay that are owed to them, up to an amount equalling four weeks' of maximum insurable earnings under the <i>Employment Insurance Act</i> (currently about \$3,323), in the event their employer becomes insolvent (see s. 7). The government can then seek recovery of amounts paid out to these employees from the insolvent employer, and where that employer is a corporation, the government can seek recovery from the directors of the corporation (s. 36).</p>	<p><i>Wage Earner Protection Program Act</i></p>
<p>Protect Workplace Safety</p>	<p>The <i>Workplace Safety and Insurance Act</i> governs the administration of the province's workplace insurance regime, including revenue generation through fees and levies on registered firms and claims administration for injured workers. If a corporation commits an offence under this Act, every director or officer of the corporation who knowingly authorized, permitted or acquiesced in the commission of the offence is guilty of an offence, whether or not the corporation has been prosecuted or convicted. Any</p>	<p><i>Workplace Safety and Insurance Act</i>, ss. 157-158 <i>Occupational Health and Safety Act</i>, s. 32</p>

	<p>individual convicted under the Act can be liable to a fine not exceeding \$25,000 or to imprisonment not exceeding six months or to both.</p> <p>Directors and officers can also be liable under the <i>Occupational Health and Safety Act</i>, which is legislation designed to protect workers from health and safety hazards at the workplace. This Act specifically requires that directors and officers “take all reasonable care to ensure that the corporation complies with” the Act and regulations; orders and requirements of inspectors and Directors; and orders of the Minister.</p>	
Comply with Securities Legislation	<p>Directors and officers who violate the Ontario <i>Securities Act</i> are subject to personal civil liability, regulatory sanctions and criminal prosecution where they authorize, permit or acquiesce in an offence committed by the corporation (see s. 129). By way of example, directors and officers have been held personally liable for a corporation’s failure to comply with its disclosure obligations as set out in ss. 75, 77 and 78 of the <i>Securities Act</i>.</p> <p>Further, Part XXIII.1 of the <i>Securities Act</i> (s. 138) provides for a cause of action against a company, its directors, officers, and others for damages incurred due to misrepresentation or non-disclosure in the secondary market. The plaintiff does not need to prove reliance on the misrepresentation in order to advance this cause of action.</p>	<i>Securities Act</i>
Issuance of Shares	<p>Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share for a consideration other than money contrary to section 23 are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.</p>	OBCA, s. 130(1)
Criminal Acts	<p>Anyone who has the authority to direct someone to perform work is under a legal duty to take reasonable steps to prevent bodily harm to that person, or</p>	<i>Criminal Code</i>

	<p>any other person, arising from that work or task (s. 217.1).</p> <p>Directors and officers can also become personally liable for crimes perpetrated by their corporations if they are found to have been a party to the offence (e.g., do anything to aid a person doing the offence, abet any person committing an offence, or where there is a common intention) (s. 21).</p>	
<p>Protect the Environment</p>	<p>Directors and officers can be held personally liable if they directed, authorized, assented to, acquiesced or participated in a corporation's actions which constitute an offence under statutes providing for environmental protection. In many cases this liability arises regardless of whether or not the corporation itself has been prosecuted or convicted of the offence. Directors and officers may be liable for fines and/or subject to imprisonment. In addition, they may also be directed to comply with orders requiring pollution and environmental clean up. Under some legislation, directors and officers have a duty to take all reasonable care to prevent the corporation from committing the offences set out in legislation (see e.g., s. 194 of the Ontario <i>Environmental Protection Act</i>).</p>	<p>Examples: <i>Canadian Environmental Protection Act, Environmental Protection Act, the Transportation of Dangerous Goods Act, the Water Resources Act, Pesticides Act, and the Fisheries Act.</i></p>
<p>Treat Creditors and Other Stakeholders Fairly in the Context of Insolvency</p>	<p>Misconduct in the period prior to the commencement of insolvency or bankruptcy proceedings can form the basis for personal liability. Conduct which is contrary to the objectives of the BIA (which are to ensure fair treatment of creditors and other stakeholders at the point of insolvency and bankruptcy) can result in personal liability being imposed upon the directors and officers (s. 204). An offence under the BIA is a quasi-criminal offence and directors and officers may be liable on summary conviction to fines and/or imprisonment as a result (ss. 202).</p> <p>A director may be liable to the trustee in bankruptcy if the corporation paid a cash dividend or redeemed shares, within a year of the bankruptcy, under the following conditions: the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation</p>	<p><i>Bankruptcy and Insolvency Act</i> ("BIA")</p>

	insolvent; and the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent (s. 101).	
CPP and EI Contributions	Both the <i>Canada Pension Plan Act</i> and the <i>Employment Insurance Act</i> impose personal liability on directors for their corporation's failure to deduct and remit contributions. Directors will be jointly and severally liable with the corporation to pay any amount not deducted or remitted. Both the CPP and EI and their associated regulations contain provisions providing directors with due diligence defences.	<i>Canada Pension Plan Act, s 21.1</i> <i>Employment Insurance Act, s. 83</i>
Paying Taxes	Under various federal and provincial tax statutes, where a corporation is guilty of a listed offence, the directors, and in some cases officers, can be found personally liable if they directed, authorized, assented to, acquiesced in, or participated in the commission of that offence, whether or not the corporation has been prosecuted or convicted. Another major area of personal liability for directors arises when a corporation fails to deduct or remit the requisite taxes and/or employee deductions. Persons who are directors during the time the corporation was obligated to have been withholding and/or remitting these monies will be jointly and severally liable for those unpaid remittances and any interest and penalties thereon, even if they have subsequently resigned. There are limited due diligence defences.	<i>Income Tax Act, Excise Tax Act, Employer Health Tax Act, the Fuel Tax Act, Tobacco Tax Act, Retail Sales Tax Act, Corporations Tax Act</i>
Pension Plans	Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund. Directors and officers can be liable for offences relating to the treatment of pension contributions.	<i>Pension Benefits Act, ss. 109-110</i>



BIOGRAPHIES



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Robert Harrison has extensive trial and appellate experience. He is ranked by Lexpert as one of Canada's leading litigators, and is also recognized for his expertise in the current surveys of Chambers Global, Best Lawyers in Canada, and martindale.com.

Robert is perhaps best known for his success in the lengthy trial and subsequent appeals in the case of *Waxman v. Waxman*. The reasons of the trial judge make it clear that the cross-examinations conducted by Robert were fundamental to his clients' success.

Recently, Robert led Fasken's litigation team that succeeded in obtaining an interlocutory injunction restraining a hostile takeover bid.

Robert has litigated cases in many areas of substantive law, including in relation to securities, financial institutions, shareholders' remedies, insurance coverage, directors and officers liability, environmental litigation, intellectual property, professional negligence, injunctions, class actions, professional conflicts of interest, and insolvencies and restructurings. Robert regularly makes presentations on trial advocacy for professional bodies such as the Advocates' Society, the Law Society of Upper Canada and Osgoode Hall Law School. He served on the Ontario Civil Rules Committee for six years.

Areas of Practice

Litigation and Dispute Resolution

Insurance

Product Liability

Alternative Dispute Resolution

Class Actions

Corporate / Commercial

Defamation

Estate Litigation

Intellectual Property

Securities and Mergers & Acquisitions

Education

BA, Political Science and Economics
University of Toronto, 1967

LLB,
Osgoode Hall Law School at
York University, 1972

Year of Call

Ontario, 1974

Reported Cases:

- *Gold Reserve Inc. v. Rusoro Mining Limited and Endeavour Financial International Corporation*, [2009] O.J. No. 533 (S.C.J.)
- *Hemosol Corp. (Re)*, [2007] O.J. No. 271 (C.A.)
- *Hemosol Corp. (Re)*, [2007] O.J. No. 687 (S.C.J.)
- *De Beers Canada Inc. v. Shore Gold Inc.*, [2006] S.J. No. 330 (C.A.)
- *De Beers Canada Inc. v. Shore Gold Inc.*, [2006] S.J. No. 211 (Q.B.)
- *Waxman v. Waxman* [2004] O.J. No. 1765 (C.A.)
- *Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335 (S.C.J.)
- *Waxman v. Waxman* [2002] O.J. No. 2528 (S.C.J.)

Robert S. Harrison

- *Worthington Trucking Inc. v. Klingbeil (Litigation Guardian of)* (1999), 43 O.R. (3d) 697 (Ont. Div. Ct.)
- *Mutual Life Assurance Co. of Canada v. Peat Marwick* (1998), 59 O.T.C. 241; [1998] O.J. No. 5119 (Ont.C.A.)
- *Canadian Premier Holdings Ltd. v. Winterthur Canada Financial Corp.* (1998), 59 O.T.C. 304
- *Montreal Trust Co. of Canada v. Olympia & York* (1998), 66 O.T.C. 45
- *Reynolds v. Innopac*, (1998), 37 O.R. (3d) 577 (C.A.).
- *Waxman v. Waxman* (1997), 150 D.L.R. (4th) 370
- *Schumacher v. Toronto-Dominion Bank* (1997), 147 D.L.R. (4th) 128; 153 D.L.R. (4th) 187
- *Del Grande v. Toronto Dominion Bank* (1995), 21 B.L.R. (2d) 220
- *Toronto-Dominion Bank v. Grande Caledon Developments Inc.*, [1995] O.J. No. 1433
- *Slough Estates Canada Ltd. v. Federal Pioneer Ltd.* (1994), 20 O.R. (3d) 429
- *MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd.*, [1994] 12 B.L.R. (2d) 209; 55 C.P.R. (3d) 360
- *Re Lehndorff General Partner Ltd.* (1993), 9 B.L.R. (2d) 275; 17 C.B.R. (3d) 24
- *Olympia & York Developments Ltd. v. Royal Trust Co.*, (1993), 14 O.R. (3d) 1; 103 D.L.R. (4th) 129; 64 O.A.C. 324; 9 B.L.R. (2d) 221; 19 C.B.R. (3d) 1 (Ont. C.A.)
- *Re Olympia & York Developments Ltd.* (1993), 12 O.R. (3d) 500; 17 C.B.R. (3d) 1
- *Olympia and York Developments Ltd. v. Royal Trust Co.* (1993), 8 B.L.R. (2d) 69; 17 C.B.R. (3d) 75
- *Picken (Jon) Ltd. et al. v. Guardian Insurance Co. of Canada* (1993) 66 O.A.C. 39 (Ont. C.A.)
- *Miller Paving v. Scarborough (City)*, [1993] O.J. No. 2738
- *Tilley v. Hails* (1992) 7 O.R. (3d) 257
- *Reynolds v. Innopac Inc.*, [1992] O.J. No. 2041
- *St. Lawrence Cement Inc. v. Ontario (Minister of Transportation)* (1991), 50 B.L.R. 319; 3 O.R. (3d) 30
- *Upper Yonge Ltd. v. Canadian Imperial Bank of Commerce* (1990), 75 O.R. (2d) 98
- *Avery v. Value Investment Corp.* [1990] O.J. No. 843
- *Planned Insurance Portfolios Co. v. Crown Life Insurance Co.* (1989), 68 O.R. (2d) 270; 58 D.L.R. (4th) 106
- *Bentham v. Rothbart*, [1988] 26 C.P.C. (2d) 109
- *Alexander Proudfoot Co. of Canada v. Storwal International Inc.*, [1985] O.J. No. 322
- *Re Campeau Family Trust* (1984), 44 O.R. (2d) 549; 50 O.R. (2d) 296 (Ont. C.A.)

Robert S. Harrison

- *Ruddy v. Cameron Packaging Ltd.* (1983), 41 C.P.C. 154; (1984), 41 C.P.C. 154 n (Ont. C.A.)
- *Hatfield v. Globe and Mail Division of Canadian Newspapers Co. Ltd. et al.* (1983), 41 O.R. (2d) 218
- *Elviston Construction Ltd. v. Pinetree Development Co.*, [1983] O.J. No. 399
- *Cameron Packaging Ltd. v. Ruddy*, [1983] O.J. No. 566
- *Re Uranium Canada, Limited and The Queen* (1982), 30 O.R. (2d) 130
- *WMI Waste Management of Canada Inc. v. Municipality of Metropolitan Toronto* (1982), 34 O.R. (2d) 708
- *Re Convenience Services Ltd. and City of Sault Ste. Marie et al.* (1980), 30 O.R. (2d) 660
- *Evans v. The Savarin Ltd. et al.* (1980), 27 O.R. (2d) 705
- *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299
- *Sas v. Solomon et al.* (1978) 20 O.R. (2d) 603
- *Nesbitt, Thomson Co. Ltd. v. Bonefish Investments Ltd. et al.* (1978), 20 O.R. (2d) 172
- *Steiner v. Lindzon et al.* (1977), 14 O.R. (2d) 122
- *Hamilton Harbour Commissioners v. J. P. Porter* (1976), 70 D.L.R. (3d) 535; 13 O.R. (2d) 199
- *Re MacDermaid* (1976), 9 O.R. (2d) 170

Representative Experience

- *Ontario Superior Court halts Rusoro Mining's hostile takeover bid for Gold Reserve*
Advised Gold Reserve Inc.
- *Waxman v. Waxman*, [2005] O.J. No. 5671 (S.C.J.), *aff'd* (2006) 216 O.A.C. 379 (C.A.), *leave to appeal refused* [2006] S.C.C.A. No. 486
Counsel to Morris Waxman
- *Waxman v. Waxman* (2005), 10 B.L.R. (4th) 315 (Ont. S.C.J.)
Counsel to Morris Waxman
- *Waxman v. Waxman* (2005), 142 A.C.W.S. (3d) 85 (S.C.J.)
Counsel to Morris Waxman
- *National Trust c. v. H & R Block Canada Inc.*, [2003] S.C.J. No. 70
Counsel to H & R Block Canada Inc.
- *AT&T Canada completes \$5 billion restructuring*
Advised AT&T Canada Corp.

Robert S. Harrison

- *Kerry (Canada) acquires Rector Foods Group*
Advised Kerry (Canada) Inc.
- *AT&T Corp. completes \$5.5 billion "back-end" acquisition*
Advised AT&T Corp.
- *Waxman v. Waxman, [2002] O.J. No. 2528 (S.C.J.)*
Counsel to Morris Waxman
- *Special committee of Unique Broadband Systems successful in adjourning annual meeting*
Counsel to Unique Broadband Systems, Inc. (Special committee of independent directors)

Presentations

- Mining for Opportunities Across Borders, Current Issues in the International Mining and Resource Sector, October 28, 2009
- Hostile Takeovers, 10 Crucial Issues, May 12, 2009

Publications

- "Ten Tips for Discovery Practice", The Advocates' Society Spring Symposium 2007, May 16, 2007



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Areas of Practice

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Alternative Dispute Resolution

Defamation

Employment Law Advice

Information Technology

Education

BA (Hons), Queen's University, 1993

LLB, with distinction University of Western Ontario, 1996

Year of Call

Ontario, 1998

Berkley Sells practises civil litigation with a focus on corporate/commercial disputes and internet litigation. He has recognized expertise with respect to matters involving "extraordinary relief," in particular Anton Piller orders and Mareva and other injunctions. He has experience at both the trial and appellate level including litigation involving: professional liability (negligence, negligent and fraudulent misrepresentations, breaches of fiduciary duties); corporate governance (oppression, directors' and officers' duties and liability); interlocutory proceedings (including complex motions for injunctions, contempt of court, interim relief from oppression, summary judgment and recovery and preservation of property); and matters involving employment relations, defamation, breach of confidence, contract interpretation and fraud.

In 2009 Berkley was named a "Rising Star" by Lexpert, a leading legal publication. The award recognizes leading lawyers under the age of forty from law firms and in-house counsel across Canada.

In 2008 Berkley received the Centre for International Legal Studies' certificate of appreciation for his achievements in legal research and writing.

Berkley is the Editor-in-Chief of *Williston and Rolls Court Forms*, 2nd Edition, the foremost guide to civil litigation precedents in Ontario. He has also been a speaker and an author on a wide variety of litigation topics. Since 2002 he has been an annual guest lecturer for the Advanced Litigation Practice course at the Faculty of Law at University of Western Ontario. For many years he has presented seminars on topics such as motions court practice and procedure, civil case management and the conduct of out of court examinations.

Berkley summered with the firm in 1995, articulated with the firm in 1996-97, joined the litigation department as an associate in January 1998 and became a partner in 2003.

Berkley D. Sells

Representative Experience

- *MDS completes divestiture of instrument division to Danaher for US\$650 million*
Canadian counsel to MDS Inc.
- *Confidential Commercial Arbitration* [2010]
The Honourable Patrick T. Galligan, Q.C., arbitrator – successfully defended a contractual dispute in the exploration mining industry.
- *Ontario Superior Court halts Rusoro Mining's hostile takeover bid for Gold Reserve*
Counsel to Gold Reserve Inc.
- *NorthWest Value Partners Inc. v. Bell et al* [2009], O.J. No. 3632 (Ont. S.C.J.) *per* Strathy J.
A motion for an injunction seeking to restrain the closing of a private placement involving the issuance of units in a real estate investment trust.
- *Bridgestone Canada Inc. v. John Doe*, [2009] CV-09-370274 (Ont. S.C.J.) *per* Campbell J.
A motion for an *Anton Piller* order involving electronic and other evidence.
- *Gold Reserve Inc. v. Rusoro Mining Ltd. and Endeavour Financial International Corporation* (2009), 54 B.L.R. (4th) 226 (Ont. S.C.J.) *per* Cumming J.; leave to appeal refused, [2009] O.J. No. 1442; 251 O.A.C. 127 (Ont. Div. Ct.) *per* Bellamy J.
A motion for an injunction to stop a hostile takeover bid for a publicly traded company and for the return of confidential information.
- *Bridgestone Canada Inc. v. John Doe*, [2009] CV-09-370274 (Ont. S.C.J.) *per* Brown J.
A motion to compel Internet service providers to disclose information an intended proceeding involving misuse of confidential information.
- *Joseph Mimran and Associates Inc. v. John Doe*, [2008] (Ont. S.C.J.) *per* C. Campbell J.
A motion to compel an Internet service provider to disclose information.
- *ArcelorMittal Dofasco Inc. v. U.S. Steel Canada Inc.*, [2008] O.J. No. 4412 (Ont. S.C.J.) *per* H.J. Wilton-Siegel J.
Response to a motion to strike the clam in a breach of contract case.

Berkley D. Sells

- *Longyear Canada ULC v. 897173 Ontario Inc. (J.N. Precise)*, [2007] O.J. No. 4834; 162 A.C.W.S. (3d) 671 (Ont. S.C.J.) *per* Conway J.
A motion for an injunction seeking to restrain the completion of an asset sale in the exploration mining industry.
- *Hummingbird Ltd. v. Mustafa et al*, [2007] O.J. No. 3624; 160 A.C.W.S. (3d) 430 (Ont. S.C.J.) *per* Master Sproat
A motion regarding production of electronic evidence in the context of a multi-million dollar international fraud case.
- *Benefits Incorporated et al v. Macdonald Administration Services Limited*, [2007] 07-CV-335486 PD 2 (Ont. S.C.J.) *per* Spence J.
An urgent motion for an injunction and interim recovery of property arising out of the insurance industry.
- *DaimlerChrysler sells Chrysler Group to Cerberus Capital Management in US\$7.4 billion deal*
Acted as special Canadian counsel to DaimlerChrysler AG
- *Pipeline Mechanical Services Ltd. v. Metro Capital Management Inc.*, [2005] O.J. No. 4841 (Ont. S.C.J.) *per* Frank J.; *appeal allowed*, [2006] O.J. No. (Ont. C.A.) *per* O'Connor A.C.J.O., Cronk J.A. and Lang J.A.
Counsel to Metro Capital Management Inc.
- *Alboini and Northern Financial Corporation v. John Doe*, [2006] 06-CV-317400 PD1 (Ont. S.C.J.) *per* C. Campbell J.
Counsel to Northern Financial Corporation
- *Phasecom Systems Inc. v. Systems 2 Communications Inc.*, [2005] O.J. No. 46; 136 A.C.W.S. (3d) 233 (Ont. S.C.J.) *per* Ducharme J.
Counsel to Phasecom Systems Inc. c.o.b. as Mastec Canada
- *Halasz v. Systech Retail Systems (Canada) Inc. (2005)*, 73 O.R. (3d) 179 (Ont. S.C.J. - Commercial List) *per* Ground J.
Counsel to Systech Retail Systems (Canada) Inc.
- *Ross v. Holley*, (2004), 28 C.C.L.T. (3d) 83 (Ont. S.C.J.) *per* Low J.
An action for Internet defamation which resulted in one of the largest damage awards for Internet libel in Canada

Berkley D. Sells

- *Dzourelou v. T.B. Bryk Management and Development Ltd. et al.* (2004), 190 O.A.C. 321; 40 C.L.R. (3d) 301; 31 R.P.R. (4th) 238; 134 A.C.W.S. (3d) 234 (Ont. Div. Ct.) per Dawson J.
Counsel to T.B. Bryk Management and Development Ltd.
- *Metropolitan Toronto Condominium Corp. No. 620 v. Barcres Wholesale Hardware Ltd. et al.*, [2004] O.J. No. 2382 (Ont. S.C.J.) per Cameron J.
Counsel to Metropolitan Toronto Condominium Corp. No. 620
- *Bahlhieda v. Santa*, (2003), 233 D.L.R. (4th) 382; 68 O.R. (3d) 115; 20 C.C.L.T. (3d) 297; 28 C.P.R. (4th) Ont. C.A. per McMurtry, C.J.O., Goudge J.A. and Gillese J.A.
Counsel to Elaine Bahlhieda
- *Law Society of Upper Canada v. Towers Perrin et al* (2003), 227 D.L.R. (4th) 577; 65 O.R. (3d) 577; 38 CPC (5th) 40; 174 O.A.C. 49; 123 A.C.W.S. (3d) 480 (Ont. C.A.) per McMurtry C.J.O., Borins J.A. and Carthy J.A.
Counsel to Tillinghast, a Towers Perrin Company and Towers Perrin Inc.
- *Court dismisses \$110 million actions against Ventra Group*
Counsel to Ventra Group Inc.
- *Valeo Sylvania L.L.C. v. Ventra Group Inc.* (2001), 48 CPC (5th) 195 (Ont. Div. Ct.) per MacKenzie J.
Counsel to Ventra Group Inc.
- *Valeo Sylvania L.L.C. v. Ventra Group Inc.*, [2001] O.J. 5629 (Ont. S.C.J.) per Blair, R.S.J.
Counsel to Ventra Group Inc.
- *Ciciretto v. Embassy Cleaners Inc.* (1998), 75 O.T.C. 91 (Ont. Gen. Div.) per Hoilett, J.; *aff'd* (1999), 126 O.A.C. 274 (Ont. C.A.)
Counsel to Embassy Cleaners Inc.
- *Valeo Sylvania L.L.C. v. Ventra Group Inc.*, [2001] O.J. 3382 (Ont. S.C.J.) per Master Polika
Counsel to Ventra Group Inc.
- *Valeo Sylvania L.L.C. v. Ventra Group Inc.*, [2001] O.J. 1998 (Ont. S.C.J.) per Master Polika
Counsel to Ventra Group Inc.

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- *Sansone v. John Doe, [2005] 05-CV-299839 PD3 (Ont. S.C.J.) per C. Campbell J.*
A motion to compel a website host and Internet service providers to disclose information in an Internet defamation case.
- *Arbitration involving accounting and auditing standards resulting in a \$1.15 million award for client*
An arbitration with 11 days of trial proceedings involving accounting and auditing standards and resulting in an award of over \$1.15 million for our client.
- *Beckett et al v. Kitcher et al [2004], 04-CV-277803 CM3 (Ont. S.C.J.), per C. Campbell J.*
A motion for a Mareva injunction and an Anton Piller order.
- *Valeo Sylvania L.L.C. v. Ventra Group Inc., [2001] O.J. 4016 (Ont. S.C.J.) per Master Polika*
Counsel to Ventra Group Inc.
- *Northern Financial Corporation et al v. John Doe, [2001] 01-CV-209054 (Ont. S.C.J.) per Somers J.*
A motion to compel Internet service providers to disclose information in an Internet defamation case.
- *Bleiwias v. John Doe, [2004] 04-CV-263234 CM2 (Ont. S.C.J.) per Matlow J.*
A motion to compel Internet service provider to disclose information in an Internet defamation case.
- *National Flight Services Inc. v. PEM-Air Limited and Trillium Air Inc. et al, [2002] 02-CL-4606 (Ont. S.C.J.) per Gans J., Nordheimer J., Lederman J., Spence J., Epstein J. and Lane J.*
Response to an application to seize a jet aircraft engine and for other relief. Reported in the February 2003 edition of Lexpert's "Big Suits".
- *Northern Financial Corporation et al v. Jane Doe, [2001] 01-CV-209873 (Ont. S.C.J.) per Wright J.*
A motion to compel Internet service providers to disclose information in an Internet defamation case.

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- *iTrade Finance Inc. v. Webworx Inc. et al* [2003], 03-CV-246248 CM3 (Ont. S.C.J.) per Sachs J.
A motion for a Mareva injunction and an Anton Piller order in a large fraud case.
- *TVA Group Inc. v. TQS Inc.* (1999), 104 O.T.C. 203 (Ont. S.C.J.) per Sachs J.
Response to a motion for a finding of contempt of court.
- *TVA Group Inc. v. TQS Inc.* (1999), 35 C.P.C. (4th) 388 (Ont. S.C.J.) per Master Albert
A motion regarding standing, common law (Slavutych v. Baker) privilege and the production of documents.
- *FirstService Corporation et al v. Saracino, Contac Travel Marketing, et al*, [2005] 05-CV-297357 PD3 per Morawetz J.
Response to an urgent motion for an injunction in a departing employee case.
- *Taribo Holdings Ltd. v. Storage @ccess Technologies Inc.* (2002), 27 C.P.C. (5th) 194 (Ont. S.C.J.) per Sachs J.
A motion to seize and preserve two million publicly traded shares.

Presentations

- Injunctions: The Practical Guide to Law, Procedure and Strategy, Osgoode Professional Development, April 19-20, 2010
- They're Coming After You: Civil Liability of Directors, Directors & Officers Six Part Series (Part 6), March 24, 2010
- Litigation Injunctions, Litigation and Dispute Resolution Group Seminar, March 4, 2010
- Obtaining, Producing and Presenting Electronic Evidence, Osgoode Professional Development, February 9-10, 2010
- Socializing Your Business: Legal and Business Considerations of Social Media, December 3, 2009
- Obtaining, Producing and Presenting Electronic Evidence, Osgoode Professional Development CLE, June 10-11, 2009

Berkley D. Sells

- Hostile Takeovers, 10 Crucial Issues, May 12, 2009
- Electronic Discovery in Ontario, Speaker, Divine Discoveries: Building a Great Case, Ontario Bar Association, December 11, 2006
- Electronic Evidence in Special Cases: Anton Piller Orders, Speaker, for Infonex E-Discovery Conference, September 20-21, 2006
- Recent Developments in Internet Defamation Law, Speaker, at Past, Present and Future of E-Commerce, Internet Distribution and Other Computer Related Issues Conference, October 20-23, 2005
- 3rd Annual Law Clerks' Forum: Enhanced Coverage of Advances and International Litigation, Insight Information, March 7, 2005

Publications

- "Williston and Rolls Court Forms", Editor-in-Chief, 2nd Edition (Toronto: Butterworths, 1987-2010), March 2005 to date
- ""Strategies to Obtain Electronic Evidence"", The Advocates' Quarterly, January 2010, January 2010
- "Global Mining Group Newsletter", Summer 2009 issue, June 2009
- "Court blocks hostile takeover bid", CIM Magazine, June/July 2009
- "E-discovery: You can't always get what you want", International Litigation News, September 2008
- "Out of Court Examinations", Litigation and Dispute Resolution Bulletin, April 2008
- "Obtaining Electronic Evidence in Special Circumstances - Anton Piller Orders and Internet Defamation", by Berkley D. Sells and Ian D. Collins Comparative Law Yearbook of International Business, 2007
- "Practice and Procedure on Urgent Motions", Insight Information Co., Toronto, 2005
- "The Value and Perils of An Anton Piller Order", by Berkley D. Sells and Ian D. Collins Insight Information Co., Toronto, 2005

Berkley D. Sells

- "A Review of the 2005 Changes to Case Management and Mandatory Mediation and their Impact on Litigation Practice in Toronto", by Berkley D. Sells and Ian D. Collins, 2005
- "Summary of the Report of the Task Force on the Discovery Process", Insight Information Co., 2004
- "Commercial List Practice and Procedure", Insight Information Co., 2004
- "The Conduct of Examinations for Discovery", Insight Information Co., 2004
- "Ontario C.A. Directs Trial of Issue in Internet Defamation Lawsuit", The Lawyers Weekly, with Peter A. Downard, October 31, 2003
- "Fasken Martineau Wins Internet Libel Appeal", Litigation Bulletin by Peter A. Downard and Berkley D. Sells, October 2003
- "California's new hacker law and its potential impact on Canadian business", The Lawyers' Weekly, August 2003
- "California Hacker Disclosure Law Will Have Wide Repercussions", The Lawyers Weekly, August 15, 2003
- "Case Comment: Denison Mines Limited v. Ontario Hydro The Tough Test for Leave to Appeal from Arbitrators? Determination of Questions of Law", by Berkley Sells, February 2003

Memberships and Affiliations

- Member, Advocates' Society (Intermediate Member since 1998 and Regular Member since 2003)
- Member, Canadian Bar Association
- Member, Metropolitan Toronto Lawyers Association
- Member, Law Society of Upper Canada



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Areas of Practice

Securities and Mergers & Acquisitions

Corporate Governance

Corporate / Commercial

Cross-Border and International Transactions

Education

LLB,
Osgoode Hall Law School at
York University, 1976

BA,
University of Toronto, 1973

Year of Call

Ontario, 1978

William K. Orr focuses his practice on corporate governance and has acted for many boards of directors and independent committees of boards. Bill specializes in securities regulation including multi-national transactions in Canada, the United States, the United Kingdom and other countries. He is a recognized expert in public and private financing, private placements, takeover bids, mergers and acquisitions, going-private transactions, corporate governance, restructurings, and stock exchange and securities enforcement issues. His clients include boards and independent committees of boards of directors, public companies, investment dealers and institutional investors.

Among his current mandates, Bill serves as independent counsel to the Board of OMERS Administration Corporation.

Bill has taught securities regulation and business law courses at Queen's University, Osgoode Hall Law School, McGill University and the University of Toronto. In 1985 he co-authored a book, *Private Placements in Canada*, published by Carswell.

Representative Experience

- *Northland Power Income Fund closes \$161 million offering of trust units and convertible debentures*
Advised the underwriters led by CIBC World Markets
- *Northland Power Income Fund merges with Northland Power Inc.*
Advised the Independent Trustees of Northland Power Income Fund
- *Dectron completes going private transaction*
Advised the Special Committee of Dectron Internationale Inc.
- *Northland Power completes Jardin d'Eole wind project financing*
Advised Northland Power Income Fund

William K. Orr

- *Tembec completes US\$1.5 billion recapitalization*
Advised Tembec Inc. (Special Committee)
- *Emergis acquired by TELUS for \$763 million*
Advised the Special Committee of Emergis Inc.
- *Spinrite Income Fund completes sale of substantially all of its assets*
Advised the Special Committee of the Board of Trustees of Spinrite Income Fund
- *Rio Tinto acquires Alcan in \$38 billion deal to form world's leader in aluminum*
Advised the special committee of Alcan Inc.
- *Magna announces completion of substantial issuer bid totalling US\$1.1 billion*
Advised Magna International Inc. (Special Committee of the Board of Directors)
- *Magna completes US\$1.54 billion transaction involving Russian Machines*
Advised the Special Committee of the Board of Directors of Magna
- *Legacy Hotels REIT sold for \$2.5 billion*
Advised the special committee of Legacy REIT
- *Dundee REIT completes \$2.3 billion sale of Eastern portfolio to GE Real Estate*
Advised the special committee of Dundee REIT
- *Northland Power Income Fund announces funding for Thorold Cogeneration Project*
Advised the independent trustees of Northland Power Income Fund
- *Nucor Corporation acquires Harris Steel Group for \$1.25 billion*
Advised the Special Committee of independent directors of Harris Steel Group
- *Fairmont Hotels acquired by Kingdom Hotels and Colony Capital for \$4.5 billion*
Advised the special committee of the board of directors of Fairmont Hotels & Resorts Inc.

William K. Orr

- *TD Bank Financial Group acquires VFC for \$326 million*
Advised Sprott Securities Inc., the independent financial advisor to the special committee of the board of directors of VFC Inc.
- *CP Ships Limited involved in US\$2.1 billion takeover by TUI AG*
Advised the Strategic Committee of the Board of CP Ships
- *Nelson Resources in \$2 billion acquisition by LUKOIL*
Advised the independent committee of Nelson's board of directors
- *CNPC International acquires PetroKazakhstan for US\$4.18 billion*
Advised the special committee of independent directors of the board of directors of PetroKazakhstan
- *Masonite International Corporation acquired for \$3.1 billion by Kohlberg Kravis Roberts*
Advised the special committee of the board of directors of Masonite
- *Tesma International Inc. re: going private transaction by Magna International Inc.*
Advised the Special Committee of Tesma International Inc.
- *Microcell Telecommunications defends against hostile takeover bid by Telus Corporation and subsequent \$1.4 billion acquisition by Rogers Communications*
Advised the Special Committee of the Board of Directors of Microcell Telecommunications Inc.

Presentations

- The Intensive Course in Canadian Securities Law and Practice, Osgoode Professional Development CLE, October 14, 2009
- Fairness Opinions and the OSC Ruling - Why Directors Should Care, PwC's Strategy Talks Podcast Series, May 22, 2009
- Hostile Takeovers, 10 Crucial Issues, May 12, 2009
- Board Meetings and Communications: Common Problems and Pitfalls, The Advanced Legal Guide to Advising the Public Company Board of Directors, January 20, 2009
- The Intensive Short Course in Canadian Securities Law and Practice, Osgoode Professional Development Centre, October-November 2008

William K. Orr

- Canadian Securities Regulation Course, November 24-25, 2008
- 24th Annual Canadian Securities Regulation Course, Insight Information, May 21-22, 2008
- Insight Info's 23rd Annual Canadian Securities Regulation Course, November 13-14, 2007
- Insight Information: Canadian Securities Regulation Course, May 16-17, 2007
- Osgoode Law Conference: Understanding and Managing Regulatory Investigations, April 23, 2007
- Securities Law Practitioners' Conference 2007, February 1, 2007
- Recent Developments in Governance Rules, November 30, 2006
- The Intensive Course in Canadian Securities Law and Practice: Take-Over and Issuer Bids, November 1, 2006
- Canadian Securities Regulation Course, Co-chair, Insight Information, November 2006
- Osgoode Hall: Intensive Course in Canadian Securities Law and Practice, October 18 & November 08, 2006
- Osgoode's Advanced Legal Guide to Advising the Public Company Board of Directors, October 3-4, 2006
- The Advanced Legal Guide to Advising the Public Company Board of Directors, Speaker, Osgoode Hall Law School, October 2006
- 24th Annual Conference and Trade Show for Treasury and Finance Professionals, September 10-12, 2006
- Corporate Governance, Speaker, TMAC, September 2006
- Corporate Governance, Speaker, TMAC, Montreal QC., June 2006
- Association of Canadian General Counsel Seminar, May 1, 2006
- Canadian Securities Regulation Course, Co-Chair, Insight Information Conference, May 2006

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- Corporate Governance, Speaker, Six-Minute Business Lawyer 2006, Law Society of Upper Canada Speaker, Six-Minute Business Lawyer 2006, Law Society of Upper Canada, June 2006
- Association of Canadian General Counsel: Recent Developments and Trends in Canadian Securities Regulation, May, 2006
- Third Advanced Forum on Securities, January 25-26, 2006

Publications

- "20 Questions Directors Should Ask About Special Committees", Canadian Institute of Chartered Accountants publication, April 2008
- "Take-Over and Issuer Bids", Co-author, with A. Atkinson, Osgoode Hall Law School, 2006
- "Board Meetings and Other Board Communication: The Pitfalls...and How to Avoid Them", Author, Osgoode Hall Law School, 2006
- "CEO/CFO Certification and "Whistle Blowing"", Co-author with P. Franco, Insight, 2004
- "International Due Diligence", Co-author with P. Franco and K. Michael Mcconnell, Federated Press, 1999
- "Legislative and Regulatory Financial Reporting Requirements", Co-author, with P. Franco and L. Misetich, Infonex, 1998
- "Due Diligence in International Transactions", Co-author with P. Franco and D.A. O'Connell, Federated Press, 1997
- "The Sale of Public Company Control Block Securities", Co-author with B.W. Loepky, in Mergers and Acquisitions, 1996
- "Products, Transactions and Legal Structures", Author, materials for the Part-Time L.L.M. in Securities Law course at Osgoode Hall Law School, with J. Holmes, 1996 - 1998
- "Notes Respecting Legal Opinions in Securities Transactions", Co-author with R Sorell, Insight, 1993
- "Offering Memoranda", Co-author with D.A. Judson and R.R. Sorell, Insight, 1993

William K. Orr

- "New Developments in Cross-Border Financings: The Multi-Jurisdictional Disclosure System", Co-author, with S.E. Dunlop, Canada-U.S. Trade, 1992
- "Private Placements in Canada", Carswell, (with D.W. Drinkwater and R.R. Sorell), a book dealing with financing in Canada, 1985
- "Canadian Securities Regulation", Co-author with D.W. Drinkwater and R.R. Sorell, course materials for two-day conference by Insight Information, 1984
- "Securities Regulation", Cases and Materials, casebooks for the Securities Regulation courses at Queen's University Faculty of Law, 1982, 1983, 1984 and 1985; at Osgoode Hall Law School (with D.W. Drinkwater and R.R. Sorell), 1986; (with R.R. Sorell); and 1987; and at the University of Toronto Faculty of Law, 1986, 1988 and 1989; and materials for the course in Advanced Securities Regulation at the University of Toronto Faculty of Law, 1988, 1989, 1990 and 1991, 1982 - 1991

Memberships and Affiliations

- Institute-certified Director (ICD.D), Institute of Corporate Directors
- Board of Directors, Institute of Corporate Directors
- Senior Securities Legal Advisory Group, Ontario Securities Commission

Rankings and Awards

- Listed as a recommended lawyer in the area of Directors' duties and liabilities (Canada) by *Practical Law Company* in 2009
- Consistently named one of the country's top lawyers in Corporate Commercial, Corporate Finance and M&A in the annual *Guide to the Leading 500 Lawyers in Canada* published by Lexpert/American Lawyer Media
- Internationally recognized in the area of Corporate Governance in Who's Who Legal's *The International Who's Who of Business Lawyers*
- Listed and rated in Chambers Global's *The World's Leading Lawyers for Business* as a Corporate/M&A lawyer
- A Leading Lawyer in Canada in the area of Capital Markets in the *International Financial Law Review*

William K. Orr

Community Involvement

Bill has served on a number of community and charitable boards of directors, including:

- President, Family Service Association of Metropolitan Toronto
- Chair, Board of Trustees, Trinity College, University of Toronto
- Chair, Board of Directors, Dellcrest Children's Centre
- Member, College of Electors of the University of Toronto
- Director and Honourary Counsel, The Duke of Edinburgh's Award – Young Canadians Challenge

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